Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1692

JOHN DAVID MOORE, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITIONER'S BRIEF IN REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

JOSEPH (SIB) ABRAHAM, JR.
Attorney at Law
505 Caples Building
El Paso, Texas 79901

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LIST OF AUTHORITIES

in Appendix D to the Petition For a Writ of Certiorari. The opinion of the Court of Appeals was not reported, having been stamped: DO NOT PUBLISH; however, this opinion appears in Appendix G to the Petition For a Writ of Certiorari. A copy of the order denying the Petition for a Rehearing en banc, entered April 22, 1976, appears in Appendix H to the Petition For a Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 9, 1976. A Petition for a Rehearing en banc was timely filed and an order denying the Petition for a Rehearing en banc was entered on April 22, 1976. The Petition for Certiorari was timely filed within thirty (30) days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I.

Whether an accused may be properly convicted of possession of narcotics where the evidence revealed only his presence with another at the residence where the contraband was seized, without additional showings of occupancy, control, or other affirmative links.

II.

Whether the hearsay tip of an unidentified informer contained in the affidavit of the search warrant may properly be used by the Government in its final argument for conviction; and by the Court in its Findings of Fact and Amended Findings of Fact supporting conviction, especially in the instant case where the Government opposed disclosure and the Court denied disclosure of this same unidentified informant.

CONSTITUTIONAL PROVISIONS INVOLVED

The following pertinent portion of the Fifth Amendment to the Constitution of the United States:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law, . . ."

and the following pertinent portion of the Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

REPLY TO THE ARGUMENT OF THE UNITED STATES

(1) Whether An Accused May Be Properly Convicted Of Possession Of Narcotics Where The Evidence Revealed Only His Presence With Another At The Residence Where The Contraband Was Seized, Without Additional Showings of Occupancy, Control, Or Other Affirmative Links.

A.

In dealing with the Petitioner's first question above, the Government proposed its legal theory of the case supported by a single precedent:

". . ., However, *the Officers' testimony that Petitioner was discovered in the immediate vicinity of the unconcealed heroin was sufficient to support a finding of dominion or control.* See *United States v. Turner*, 505 F.2d 477 (C.A.D.C.). certiorari denied, No. 75-5724, January 12, 1976" (Resp. 4) (emphasis supplied).

after examining *Turner*, the Petitioner discovered that it was a totally false precedent for two completely different reasons. First, *Turner* is a decision without opinion which is contained in a table of such opinions, and it is followed by an asterisk (*). Turning to 505 F.2d 475 where the asterisk (*) is explained reveals just what sort of precedent *Turner* really is.

"An asterisk identifies those cases where the judgment or order is accompanied by a memorandum explanatory of the judgment. Such memorandum is not included with the opinions of the Court that are printed, *and it may not be cited in Briefs or memorandum of counsel as precedents,* under Local Rules 8(b)." 505 F.2d, at 475 (emphasis supplied).

The second reason that *Turner* is not a valid precedent is found in the memorandum mentioned above.

"As to Turner's conviction, the sufficiency of the evidence is established by the location of the shopping bag underneath the right front seat where he was sitting, together with the officer's testimony that Defendant's head and shoulders disappeared from view. While it is

conceivable this disappearance was caused by the structural characteristics of the car blocking the officer's vision as he approached the right front door, *the more likely thrust of the testimony is that there was a concealment movement.*" (emphasis supplied)

Memorandum (not cited as precedent) filed in *United States v. Randolph Turner*, Cause No. 73-2139, United States Court of Appeals for District of Columbia (September Term 1974); result listed in table in 505 F.2d 477 (C.A. D.C. 1975); certiorari denied, No. 75-5742, January 12, 1976.

So in *Turner*, we have (1) the contraband located directly under the seat of the accused, and (2) an act of concealment or dominion. This is clearly sufficient for a showing of constructive possession and clearly insufficient as a precedent in *Moore* where there was only the Petitioner's presence, not alone, without any affirmative evidence of relationship to the premises, the contraband, or another in possession. Thus the use of *Turner* as precedent in this case not only contravenes the Local Rules of the D.C. Circuit, but also seriously warps the thrust of *Turner's* facts.

The rule in D.C. Circuit is directly opposite from that portrayed by the Respondent. The leading case in the D.C. Circuit is *United States v. Holland*, 445 F.2d 701 (1971), recently followed and cited by that Court in *United States v. Watkins*, 519 F.2d 294 (C.A.D.C. 1975).

The *Holland* case concerned facts almost identical to *Moore*. In *Holland*, the contraband was "on top of a

dresser," and when the police entered, they found a woman and the Appellant . . ." in the room that contained the dresser. *Holland*, at 703. In dealing with the above facts, Chief Judge Brazelon dealt directly and forthrightly with the difficult problem of possession:

> "Appellant may have known about the heroin, she may even have used it in his presence, but more is required before Appellant can be said to possess the heroin himself.
>
> "It is perfectly true that this Appellant may be guilty. The trouble with absence of evidence is that it is consistent with *any* hypothesis." *Holland*, at 703. (emphasis in original).

The *Holland* Court went on to point out where the Government had failed to prove its case.

> "We must remember that constructive possession means being in a position to exercise dominion or control over a thing. (footnote omitted) Such a position should not be lightly imputed to one found in another's apartment or home. If an inference of constructive possession must be made, the jury must have before it information about the regularity with which the person in question occupied the place and about his special relationship with the owner or renter.
>
> "[2] The necessary background information is strikingly absent in this case. The Government claims that the presence of men's clothes

> in the apartment contributes to the conclusion that appellant's presence was 'neither fortuitous nor brief, but residential,' but did not offer proof that the clothes in question belonged to or even fit appellant. For all the Government has shown, appellant may be guilty of no more than an illicit relationship." *Holland*, at 703.

In *Moore* we have an even greater failure to produce convicting evidence in the Courtroom. In *Moore* we lack evidence of:

(1) Ownership of the apartment;
(2) Residence in the apartment;
(3) Length of stay by Petitioner or Cueva before search;
(4) Personal effects of any party;
(5) Fingerprints on contraband or scattered in the apartment so as to show occupancy;
(6) Bills, receipts, or any other papers of any party;
(7) And, of course, any evidence of actual possession or control by any party or association with that party in possession.

No evidence relating to these elements were introduced at the trial. In fact, the only testimony as to evidence of residency or occupancy received a negative reply.

Q. "Yes. Did you find any indication of ownership of the apartment?"
A. "No, Sir, I don't believe I did." (TR 53)

The only personal item mentioned in the testimony was the sort that could easily be associated with a woman.

> Q. "Could you tell the Court what you found?"
> A. "I found a scale, a gram scale and also a — what appeared to be a hat box or some kind of make up box containing syringes and some balloons." (TR 50)

In Holland, the lady present pleaded to lesser offenses; in *Moore*, the Government dismissed the charges against Cueva. Can the suspicions and hunches of the police and the prosecutor make up for the lack of evidence against the one they choose to prosecute; can prosecutorial discretion determine who is to be adjudged innocent and who is to be adjudged guilty?

B

The Respondent also made a point of demanding cases involving knowledge of contraband or at least unconcealed contraband. Besides, *Holland, Supra.*, there are a plethora of such cases. A recent case in the Fifth Circuit is *United States v. Maspero*, 496 F.2d 1254 (C.A. 5 1974). There the Court delivered a plainly worded opinion on this very issue:

> "We reach a different conclusion with respect to Ruiz. He was present in the driveway of the Maspero home when the tractor-trailer pulled in. But mere presence in the area of contraband or awareness of its location is not sufficient to establish possession." *Maspero*, at 1359.

(2) Whether The Hearsay Tip Of An Unidentified Informer Contained In The Affidavit Or The Search Warrant May Properly Be Used By The Government In Its Final Argument For Conviction, And By The Court In Its Findings Of Fact And Amended Findings Of Fact Supporting Conviction, Especially In The Instant Case Where The Government Opposed Disclosure And The Court Denied Disclosure Of This Same Unidentified Informant.

It is usually nearly impossible to demonstrate that a Trial Court has improperly considered hearsay evidence admitted solely for the purpose of determining probable cause for a search. This case is different, use of such testimony appears both in the Court's *Findings of Fact*, (Pet. App 10A), and even more clearly in its *Notice of Amendment to Findings of Fact*, (Pet. App 13a). The Government conceded this point in its brief in opposition:

> "Petitioner correctly notes that the trial court apparently relied upon evidence introduced on the motion to suppress to support its finding that petitioner was in constructive possession of the heroin. In particular, the court referred in its findings of fact to the informant's statement to the police (Pet. App. 13a) that petitioner was the occupant of the apartment at the time of the seizure." (Resp. 4)

The Government went on to concede that this use was improper, (Resp. 4) but defended that use by maintaining that it was harmless error. In this admittedly close question of possession, how can a significant piece of evidence relating to control of the premises be deemed harmless? How can a finding which the trial court felt was important enough to include in its original and amended findings of fact be considered harmless? The Government also makes the point that the defense waived any objection to the use of this testimony on the merits by allowing the Court to carry the Motions to Suppress and to Disclose, and not instructing the Court to disregard the informant's hearsay remarks to police as to the guilt or innocence. Is that really the burden of the defense counsel? Regardless of the answer, that question brings us to the heart of this matter. The Petitioner's argument is simple: that his position before trial, during trial, and after trial was that the informant's testimony *should* have been utilized by the Court and respective counsel on the issue of guilt or innocence. The Petitioner filed a motion to disclose this informant and compel him to testify and be cross-examined on the merits before trial (R-36). The Petitioner argued in his closing argument that this informant should be disclosed and heard from on the merits (R-75). After the trial, the Petitioner filed a supplementary brief in which he again pleaded with the Court to disclose the informant so that he could be examined on the issue of possession. (R-51) The Prosecution and the Trial Court took these motions and arguments to heart, at least half-heartedly. The Government strenuously argued for conviction using the informant's testimony as the cornerstone of his argument (TR 71-72, reproduced in Pet. 1A). Following this line, the Court utilized this in-

formant's testimony in its findings of fact dealing with occupancy (Pet. at 10A and as amended at 13A). So we see that the Court and the Government agreed with the defense that this informant should be a witness as to the guilt of the accused; their disagreement was with the defense contention that the accused should have equal access to this unseen witness whose testimony was convicting him. The Government vigorously opposed this in omnibus answers (R-10), followed by a formal motion in opposition to disclosure (R-40); and the Court agreed, never ordering such disclosure. Thus, the informant became the perfect prosecution witness, both a sword and a shield. The Government defended this refusal to disclose in its brief, (Resp. 6), by citing the landmark case of *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639. *Roviaro* holds and the Government argues that disclosure of the informant is not required on a probable cause question. The Petitioner agrees, but this is not the question. The question is whether disclosure of the informant is required in a case where the Government uses the informant's hearsay remarks to argue for conviction (TR 71-72) and the Trial Court uses these same remarks in its findings of facts supporting conviction. (Pet. App 13A). In this situation, *Roviaro* cuts the opposite way.

> "Where the disclosure of the informer's identity . . . is essential to a fair determination of the cause, the privilege must give way." *Roviaro*, 353 U.S. at 61.

There is no question as to the inherent unfairness of a criminal proceeding which denies the accused the opportunity of cross-examination or even knowledge

of the name of a principle witness against him. Because of the closeness of the issue of possession, who can say that this witness was "harmless?" However, does not the Sixth Amendment guarantee cross-examination of even "harmless" witnesses?

This Court talked about the Sixth Amendment in a Texas case, *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

Pointer holds that confrontation is ". . . essential . . ." and ". . . fundamental . . ." to a ". . . fair trial . . ."; *Roviaro* holds when the privilege of non-disclosure runs against what is ". . . essential . . ." to a ". . . fair determination . . . ," the privilege must give way. This is the Petitioner's position.

FINAL ARGUMENT AND CONCLUSION AS TO WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

This case presents clear and compelling reasons for the granting of writ of certiorari. First of all, there are no major fact disputes. Looking at the briefs of the respective counsel at trial, before the Fifth Circuit,

and before this highest Court demonstrates a rather remarkable agreement as to the facts of this case. This case is not a muddle of conflicting testimony and evidence; it is a case of two questions of law. The first of these legal issues can be summarized as follows:

> MAY AN INDIVIDUAL BE CONVICTED OF POSSESSION OF CONTRABAND BY EVIDENCE SHOWING HIS PRESENCE IN AN APARTMENT LIVING ROOM TOGETHER WITH ANOTHER PERSON, IN THE PRESENCE OF UNCONCEALED CONTRABAND, WITHOUT A FURTHER SHOWING OF SOME AFFIRMATIVE ELEMENT SUCH AS CONTROL OR RELATIONSHIP WITH THE PREMISES OR WITH ANOTHER IN POSSESSION?

The above question relating to possession of contraband is obviously of great importance especially given the trend and tenor of modern society. Besides the relatively ancient prohibition against the possession of stolen goods, fruits of crimes and the like, we now have an ever increasing array of forbidden items including hundreds of chemical substances. It is vitally important to American people to know what possession is. Whether it is active relationship requiring affirmative control or relation; or whether it is a passive relationship which could occur through simply standing in an associate's living room and viewing the object. This is the question that the Petitioner asks this Honorable Court to address itself to.

The second question of law can be summarized as follows:

MAY THE PROSECUTION REFUSE TO DISCLOSE AN INFORMANT'S IDENTITY WHILE UTILIZING THAT INFORMANT'S HEARSAY TESTIMONY TO ARGUE FOR CONVICTION?

MAY A TRIAL COURT REFUSE TO ORDER DISCLOSURE OF AN INFORMANT'S IDENTITY WHILE UTILIZING THIS INFORMANT'S HEARSAY TESTIMONY IN ITS FINDINGS OF FACT TO SUPPORT CONVICTION?

It is the Defendant's contention that the above procedure violated his due process rights under the Fifth Amendment (Pet. 2) and his rights of confrontation under the Sixth Amendment (Pet. 3). This case represents an ideal vehicle for review under a writ of certiorari. The improper use of the informant's hearsay testimony is not mere conjecture or supposition; it affirmatively appears in the record of the case, and has been admitted by the Government in its brief in opposition (Resp. 4). On the other hand, the record clearly shows that the Petitioner pushed his demand for disclosure and examination of the informant on the merits of the case. The Petitioner did this before trial with his motion (R-36) and brief (R-38), during trial in his closing argument (TR 75), and after trial in his supplementary brief (R-51). He also presented his argument and authorities relating to that issue before the United States Court of Appeals for the Fifth Circuit in his appellate brief (Pet. App 19a), his supplementary brief (Pet. App 20a), and his brief for rehearing (Pet. App 21A). The Petitioner now finds himself before the highest Court in the land, his Court of last resort. The facts and issues are clear, but the question

that remains is whether this issue raised by the Petitioner is important enough to deserve consideration by this honorable and august body. The question of unseen and unexamined witnesses is not a novel one, but can we go on to say that procedures held in disfavor since the Star Chamber do not merit review? There is always the possibility that this Petitioner is guilty, as Chief Brazelon remarked in *Holland, Supra.*, and we must remember that some five ounces of heroin are involved. However, can we say that five ounces of heroin weighs more heavily in the scales of justice than our Constitution and Bill of Rights?

The Fifth Circuit answered the above questions with silence in a conclusory opinion which did not even mention the issue of disclosure (Pet. App 16a). The Petitioner confidently looks forward to hearing the voice of the Law on his case, and urges this Court to grant his petition for a writ of certiorari.

Respectfully submitted,

JOSEPH (SIB) ABRAHAM, JR.
Attorney for Petitioner
505 Caples Bldg.
El Paso, Texas 79901
(915) 532-1601

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record, Robert H. Bork and Richard L. Thornburgh, by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of September, 1976.

JOSEPH (SIB) ABRAHAM, JR.